BANK BUMIPUTRA (M) BHD. & ANOR.

v.

LORRAIN ESME OSMAN & ASPATRA SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C 138 OF 1985]
26 APRIL 1985

CIVIL PROCEDURE: *Application to discharge Mareva injunctions and Anton Piller order obtained ex parte - Whether plaintiffs ought to be allowed to introduce fresh evidence at hearing - Whether Mareva injunctions can be granted against the interveners - Justification to lift the corporate veil of companies in question, including interveners - Principles applicable in granting or refusing Mareva injunction and Anton Piller order.*

The interveners (Aspatra Sdn. Bhd. & 28 Ors.) applied to set aside Mareva injunctions granted *ex parte* in so far as they affect each of them respectively and Aspatra Sdn. Bhd. applied to discharge the Anton Piller order granted against it.

During the hearing of the application, the plaintiffs' Counsel filed an affidavit exhibiting fresh evidence. Counsel for the interveners objected, submitting that a Mareva injunction is only granted against a defendant and not against a third party such as the interveners.

Held:

[1] Even if evidence was available at the time of the *ex parte* applications for the Mareva Injunctions and the Anton Piller order but the evidence was not presented to the Judge, the plaintiff is not estopped from presenting such evidence during the *inter partes* proceedings.

[2] The Court has jurisdiction to extend Mareva injunctions to third parties.

[3] Where justice so demands, the Court will lift the "veil of incorporation" during the interlocutory hearing.

[4] The Court has power to order discovery against a defendant or third party in a Mareva injunction.

[5] For a Mareva injunction to be granted, the plaintiffs must show that they have a good arguable case, produce evidence of the defendant's assets within jurisdiction and the risk of the assets being removed before judgment.

[Mareva injunctions to continue in force in respect of most of the applicants and dissolved in the case of the others. Application for dissolution of Anton Piller order dismissed.]

Cases referred to:

Hari Singh v. Sundarammal [1965] 2 MLJ 174
Datuk Abu Mansor bin Mohamed Nasir v. Bank Kerjasama Rakyat Malaysia Bhd. & Anor. [1982] CLJ (Rep) 69; [1982] 1 MLJ 258
Munn v. Longden [1883-84] 32 WR 675
Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd. [1984] 2 MLJ 143; [1984] 2 CLJ (Rep) 319
Lian Keow Sdn. Bhd. & Anor. v. Overseas Credit Finance (M) Bhd. & Ors. [1982] 2 MLJ 162; [1982] CLJ (Rep) 182
Third Chandris Shipping Corporation and Ors. v. Unimarine SA [1979] 2 All ER 972
Hadmor Productions Ltd. & Ors. v. Hamilton and Anor. [1982] 2 WLR 322
Ace King Pte. Ltd. v. Circus Americano Ltd. & Ors. [1982] CLJ (Rep) 444
Regal Hastings Ltd. v. Gulliver and Ors. [1942] 1 All ER 378

Salomon v. Salomon & Co. [1897] AC 22
Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners [1969] 1 WLR 1241
Re Darby [1911] 1 KB 95
Re St. Tudno [1916] P 291
Gilford Motor Company v. Horne [1933] 1 Ch 935
Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd. [1915] AC 705
Jones and Another v. Lipman & Anor. [1962] 1 All ER 442
Merchandise Transport Ltd. v. British Transport Commission & Ors. [1962] 2 QB 173
D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council [1976] 1 WLR 825
Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor. [1980] 1 MLJ 109
Tiu Shi Kian & Anor. v. Red Rose Restaurant Sdn. Bhd. [1984] 2 MLJ 313; [1984] 2 CLJ (Rep) 543
Datuk Hong Kim Sui v. Tiu Shi Kian & Anor. [1985] CLJ (Rep) 101
Iraqi Ministry of Defence & Ors. v. Arcepey Shipping Co. SA [1980] 1 All ER 480
Nippon Yusen Kaisha v. Karageorgis & Anor. [1975] 3 All ER 282
Mareva Compania Naviera SA v. International Bulkcarriers SA [1975] 2 Llyod's Rep 509
Rasu Maritima SA v. Perusahaan Pertambangan Minyak dan Gas Negara (Pertamina) [1977] 3 All ER 324
Chartered Bank v. Dak Louche & Anor. [1980] 1 All ER 205
Prince Abdul Rahman v. Abu Jaba & Anor. [1980] 3 All ER 409
Allen v. Jambo Holdings Ltd. & Ors. [1980] 2 All ER 502
Z Ltd. v. A-Z [1982] 1 QB 558
Zainal Abidin v. Century Hotel Sdn.. Bhd. [1982] 1 MLJ 260
A & Anor. v. C and Ors. [1980] 2 All ER 347
CBS United Kingdom Ltd. v. Lambert & Anor. [1982] 3 All ER 237
Ninemia Maritime Corp. v. Trave [1984] 1 All ER 398
Anton Piller KG v. Manufacturing Processes Ltd. & Ors. [1976] 1 Ch 55
Yousif v. Salama [1980] 3 All ER 405
Lian Keow Sdn. Bhd. v. C. Paramjothy & Anor. [1982] CLJ (Rep) 522
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396

Legislation referred to:
Companies Act 1965, s. 132(3)
Contracts Act 1950, s. 169

Other source referred to:
Modern Company Law, Professor Gower, 4th Edn., at p. 138

For the plaintiffs - T. Thomas; M/s. Skrine & Co.
For the interveners/applicants - Anad Krishnan; M/s. James Foong, Anad & Co.

JUDGMENT

Zakaria Yatim J:

There are before this Court 29 similar applications filed by 29 separate companies, who are interveners in this action. In their applications they seek for an order of this Court to set aside the Mareva injunctions granted by this Court on 10 January 1985 and 15 January 1985 in so far as they affect each of them respectively. One of the applicants, Aspatra Sdn. Bhd. also asks the Court to set aside an **Anton Piller** order granted by the Court against it on 15 January 1985 and varied on 17 January 1985.

Before I go into the merits of the applications, I propose to state the facts briefly and to outline the sequence of events leading to the granting of the Mareva injunctions and the Anton Piller order.

The first plaintiff (the Bank) is a company incorporated under the laws of Malaysia and carries on the business of banking. The second plaintiff (BMF) is a company incorporated under the laws of Hong Kong. BMF is resident outside the Scheduled Territories as defined in the Exchange Control Act, 1953 and has its registered address at 18/F Admiralty Centre, Tower One, 18 Harcourt Road, Hong Kong. It is wholly owned subsidiary of the Bank. The defendant (Lorrain) was at all material times a director of the Bank.. He was a subscriber to the Memorandum and Articles of Association of BMF and was its first director. From 1 January 1977 until 31 October 1983, he was Chairman of the Board of directors of BMF. He held the position of director and chairman as a nominee of the Bank.

In their statement of claim, the plaintiffs averred that on 24 October 1980, Asia Alliance Finance and Investment Ltd. (AFIL) requested Lorrain to execute certain documents relating to a personal loan of RM200,000 to be granted by AFIL to him. This loan was to be secured by a deposit of HK$2.5 million by BMF to AFIL. By cover of letter dated 30 October 1980, Ibrahim Jaafar (Ibrahim), the General Manager of BMF forwarded, on behalf of Lorrain, to AFIL the said documents duly executed by Lorrain, and requested that AFIL remit monies under Lorrain's personal loan to Lorrain's solicitors in London. In consideration of AFIL granting him the personal loan, Lorrain, on or about 30 April 1981, caused the deposit by BMF of HK$2.5 million with AFIL as security for the loan. On or about 18 May 1981, Lorrain caused the payment by BMF of monies belonging to BMF in the sum of HK$182,859.59 to AFIL, being payment of interest due on Lorrain's personal loan. On 2 February 1982, Ibrahim, on behalf of Lorrain, forwarded a cheque in the sum of HK$2,625,239.73 to AFIL in full settlement of Lorrain's personal loan. In consideration for this payment, AFIL, on 3 February 1982, returned the HK$2.5 million to BMF.

The plaintiffs further averred that between 1 January 1979 and 31 December 1980, Lorrain was responsible for approving loans and credit facilities by BMF to the Carrian group of companies in Hong Kong in the sums of US$162.9 million. Between 1 January 1981 and 31 December 1983, Lorrain again approved further loans and credit facilities to the Carrian group of Companies in the region of HK$3.2 billion. On 31 December 1980 Lorrain's solicitors in Kuala Lumpur, Messrs. Selvarajah & Associates, wrote to Maritano Investment Ltd., Hong Kong, which was a company within the Carrian Group, stating that they had received RM$12.5 million from Maritano.

The plaintiffs also averred that Lorrain approved further loans in the sum of more than US$10 million to the Carrian Group. At about the same time, George Tan, the man who controlled the Carrian Group, gave Lorrain a cash order for the sum of RM9,470,512.27 made payable to Lorrain's other solicitors in Kuala Lumpur, Messrs. Ng Ek Teong & Partners. Another sum of RM2,240,000 was remitted to the same firm of solicitors for Lorrain. On 19 March 1981, BMF through Lorrain instructed the Bank to debit BMF's account in the sum of RM3,442,340.79 and to credit the same amount to United Asian Bank, Kuala Lumpur for the account of Messrs. Ng Ek Teong who acted for Lorrain. The total sum credited to Messrs. Ng Ek Teong was RM15,152,853.60 for Lorrain.

The plaintiffs alleged that Lorrain received the sum of RM27,652,853.06 (RM12.5 million + RM15,152,853.60) through his solicitors in Kuala Lumpur wrongfully and without the knowledge and approval of the Bank and BMF and in breach of his fiduciary duty as director of the Bank and Chairman of BMF. They are therefore asking the Court to order Lorrain to return to them the sum of RM27,652,853.06 which they claim are secret profits made by Lorrain.

The writ against Lorrain was filed by the plaintiffs on 10 January 1985. On the same day, the plaintiffs made an *ex parte* application in chambers for a Mareva injunction to restrain Lorrain from transferring his assets out of jurisdiction. The application also asked the Court to order Lorrain to disclose the value, nature and whereabouts of all his assets. An order was duly granted on that day in the following terms:

> **IT IS ORDERED AND DIRECTED** that the defendant whether by himself, his servants or agents or nominees or otherwise howsoever be restrained and an injunction is hereby granted restraining him from removing from the jurisdiction of this Court, selling, disposing of, charging pledging, transferring or otherwise dealing with his assets or assets held in the names of companies controlled by him within the jurisdiction insofar as the same do not exceed the sum of RM27,652,853.06 including and in particular (1) all monies held in his accounts with the Development and Commercial Bank, Malayan Banking, United Asian Bank, Standard Chartered Bank, Citibank and Bank Buroh at their main offices in Kuala Lumpur save in so far as such monies do not exceed the sum of RM27,652,853.06 (2) all the shares held in his name or in the names of his nominees in Syarikat Guan Hoe Susuki Sdn. Bhd., Aspatra Sdn. Bhd., Aspatra Motors Sdn. Bhd., Aspatra Management Sdn. Bhd. and Malaysia Plastic Sdn. Bhd. or attempting to take any steps to remove the same out of the jurisdiction until the trial of this action or until further order **AND IT IS ORDERED** that the defendant do disclose the value, nature and whereabouts of all his assets owned beneficially by him whether in his own name or in the names of companies controlled or directed by him or otherwise howsoever and that such disclosure be made by the defendant on oath by way of an affidavit to be filed in this Court within (7) days of service of this Order on him.

On 15 January 1985, the plaintiffs made a second *ex parte* application for an order of the Court to extend the Mareva injunction granted earlier (i) to thirty-two other banks apart from the six banks mentioned in the earlier order, and (ii) to 104 other companies. The same application also asked the Court for an Anton Piller order against Aspatra Sdn. Bhd. The application was granted and the original order was varied to read as follows:

> **IT IS ORDERED AND DIRECTED** that the defendant whether by himself, his servants or agents or nominees or otherwise howsoever be restrained and an injunction is hereby granted restraining him from removing from the jurisdiction of this Court, selling, disposing of, charging, pledging, transferring or otherwise dealing with his assets within the jurisdiction insofar as the same do not exceed the sum of RM27,652,853.06 whether owned by the defendant alone or jointly or in common with any other person or persons howsoever or in the name of companies, partnerships, sole proprietorships or business controlled or directed by him including, and in particular-
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> (i) all monies held in the defendant's accounts with the banks named in Annexure A hereto at their main offices in Kuala Lumpur and at all their branches in Malaysia;
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> (ii) all monies held in the accounts operated by the companies, partnerships, sole proprietorships and business listed in Annexures B and C hereto with the banks named in Annexure A hereto at their main offices in Kuala Lumpur and at all their branches in Malaysia;
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> (iii) all monies held in the defendant's accounts and in the accounts operated by the companies, partnerships, sole proprietorships and businesses listed in Annexures B and C hereto with the Development Commercial Bank, Malayan Banking, United Asian Bank, Standard Chartered Bank, Citibank and Bank Buroh at their main offices in Kuala Lumpur and all their branches in Malaysia:
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> (iv) all the shares held in the defendant's name or in the names of his nominees in the companies, partnerships, sole proprietorships and businesses held in Annexures B and C hereto;

(v) that Messrs. Rashid Hussain Securities Sdn. Bhd. of Menara Tun Razak, Kuala Lumpur, by their agents or servants or otherwise be restrained and an injunction is hereby granted restraining them from selling, transferring, disposing of or otherwise howsoever dealing with any shares or securities in the defendant's name or in the names of his nominees;

or attempting to take any steps to remove the same out of the jurisdiction until the trial of this action or until further order. **AND THIS COURT DOTH FURTHER ORDER** that the defendant and a company controlled and directed by him viz. Aspatra Sdn. Bhd. do permit such persons not exceeding 2 in number as may be duly authorised by the plaintiffs and 1 member of the plaintiffs' solicitors to enter forthwith the premises known as No. 26, Jalan Kia Peng, Kuala Lumpur, No. 4, Jalan Stonor, Kuala Lumpur, and Wisma Stephens, 28, Jalan Kia Peng, Kuala Lumpur and any other premises under the control of the defendant or Aspatra Sdn. Bhd. at any hour between 8 o'clock in the forenoon and 6 o'clock in the afternoon for the purpose of:

(i) Inspecting all documents and files relating to the value, nature and whereabouts of all the defendant's assets owned beneficially by him whether in his own name or in the names of the companies controlled or directed by him or otherwise howsoever;

(ii) removing into the plaintiffs' solicitors' custody all the above-named documents and files.

On 17 January 1985, on a further *ex parte* application of the plaintiffs, the Anton Piller order granted on 15 January 1985 was varied by substituting the following order:-

AND THIS COURT DOTH FURTHER ORDER that the defendant and a company controlled and directed by him viz. Aspatra Sdn. Bhd. or any officer, servant or agent of Aspatra Sdn. Bhd. or such person shall appear to be in charge or control of the premises at No. 26, Jalan Kia Peng, Kuala Lumpur, No. 4, Jalan Stonor, Kuala Lumpur and Wisma Stephens, 28, Jalan Kia Peng, Kuala Lumpur and any other premises under the control of the defendant or Aspatra Sdn. Bhd. do forthwith permit such persons not exceeding four (4) in number as may be duly authorised by the plaintiffs, one (1) member of the plaintiffs' solicitors and two (2) employees of the plaintiffs' solicitors to enter the said premises at any hour for the purpose of:

(a) Looking for and inspecting all documents, records and files relating to the value, nature and whereabouts of all the defendants' assets belonging to him or owned beneficially by him whether in his own name or jointly or in common with any other person or persons howsoever or in the names of the nominees or companies controlled or directed by him or otherwise whosoever including all bank statements and banking documents belonging to the defendant.

(b) taking into the Plaintiffs' Solicitors' custody all and any of the above-mentioned documents, records and files and making copies of the same.

AND IT IS ODERED that the defendant, Aspatra Sdn. Bhd., any officer servant or agent of Aspatra Sdn. Bhd. and each of them and the person or persons for the time being, to be in charge of the premises aforesaid do produce forthwith to the person serving this Order all of the documents, records and files referred to above.

The first set of applications to set aside the Mareva injunctions was filed separately on 22 January 1985, by Aspatra Sdn. Bhd., The Lodge Sdn. Bhd., Aspatra Motors Sdn. Bhd., Orient Air Transport Sdn. Bhd., Suzuki Assemblers (M) Sdn. Bhd., and Shakey's Pizza Sdn. Bhd. Aspatra Sdn. Bhd. also asked the Court to set aside the Anton Piller order made against it.

At the outset of the hearing, the applicants, through their Counsel, Mr. Anad Krishnan, asked for leave to intervene in this suit to enable them to apply for the reliefs stated in their application. Counsel for the plaintiffs had no objection, and I granted them leave to intervene in this suit.

With regard to Suzuki Assemblers (M) Sdn. Bhd., by the consent of the parties, I ordered that the injunctions granted by the Court dated 10 January 1985 and 15 January 1985, in so far as they touch, concern, or apply to, or affect the said company, be dissolved and that the question of damages be reserved for argument.

As for the other five companies, on 24 January 1985, with the consent of the parties, I varied the order made on 15 January 1985. The order as varied permits each of the five companies/ interveners:

> to carry on and conduct all its activities in the ordinary course of business and in particular that the intervener/applicant be and is hereby at liberty to operate its various accounts with all its bankers in Malaysia (including paying in and paying out) subject howsoever to the provision that the intervener/applicant shall not without leave of the Court, except in the ordinary course of business... remove from the jurisdiction of this Court, sell, dispose of, charge, pledge, transfer or otherwise deal with any assets belonging to the intervener/applicant within jurisdiction ...

On 31 January 1985, five other companies filed similar applications before this Court. The applicants are Orchids Malaysia Sdn. Bhd., Oriewesco Sdn. Bhd., Aspatra Rentals Sdn. Bhd. Aspatra K.S. Sdn. Bhd., and Aspatra Quarries Sdn. Bhd. On 5 February 1985, the applications filed by Aspatra Rentals Sdn. Bhd. was withdrawn by Mr. Ananda Krishnan. On the same date, similar consent orders to vary the order made on 15 January 1985, were made in respect of the four new interveners/applicants.

On 2 February 1985, another thirteen similar applications were filed by thirteen companies affected by the injunctions. The applicants were allowed to intervene in this suit. They are Hoong Sang Realty Sdn. Bhd., Aspatra Corporation Sdn. Bhd., B.B. Holdings Sdn. Bhd., Nila Sdn. Bhd., Aspatra Group Holdings Sdn. Bhd., Serply Sdn. Bhd., Aspatra Securities Sdn. Bhd., Golden Mile Sdn. Bhd., Aspatra Guan Hoe Sdn. Bhd., Aspatra Quest Publishers Sdn. Bhd., Aspatra Management Sdn. Bhd., Church Street Properties Sdn. Bhd. and Daiko Properties Sdn. Bhd. On 14 February by the consent of the parties, similar variation orders were made in respect of these thirteen interveners/applicants.

On 18 February 1985, five other companies made similar applications before this Court. The five companies are L.M. Developments Sdn. Bhd., Syarikat Kin Sun MFG (M) Sdn. Bhd., Realvest Properties Sdn. Bhd., Saji Sdn. Bhd., and Indra Bumi (M) Sdn. Bhd. These applications, however, were not supported by affidavits. On the same date, similar variation orders were made in respect of these five companies with the consent of the parties.

On 18 February 1985, there were 77 other companies, which were affected by the injunction granted on 15 January 1985, that have not made any application to intervene in this case and to set aside the injunctions.

On the *ex parte* application of the plaintiffs, the injunction granted against twelve out of the 77 companies were dissolved on 18 February 1985. The twelve companies are; F.R.D. Sdn. Bhd., Development Transport Sdn. Bhd., Inquip Sdn. Bhd., Noble Denton and Associates Sdn. Bhd., Orchidland Sdn. Bhd., Sectra Warehousing Sdn. Bhd., Syarikat Pembangunan Melayu Jaya Sdn. Bhd., Telok Batak Granite and Quarry Sdn. Bhd., Cenderai Holdings Sdn. Bhd., Georgetown Pharmacy Sdn. Bhd., Travel Service (M) Sdn. Bhd., and Designs Misin Sdn. Bhd.

The injunction in respect of the remaining companies remains in force to date. However, on the application of the plaintiffs, the same variation order was made in respect of these companies as in the case of the 27 companies which intervened earlier.

Before I go into the applications to set aside the Mareva injunctions and the Anton Piller order, I wish to deal with an objection raised by Mr. Krishnan. In the course of the hearing of the applications, Mr. Thomas filed an affidavit dated 29 January 1985, which exhibited searches made at the Registry of Companies pertaining to the shareholdings of the interveners. Mr. Krishnan objected to the introduction of this evidence by the plaintiffs. According to him, the plaintiffs were not permitted to introduce fresh evidence at that stage of the proceedings. He cited *Hari Singh. v. Sundarammal* [1965] 2 MLJ 174 and *Datuk Abu Mansor bin Mohamed Nasir v. Bank Kerjasama Rakyat Malaysia Bhd. & Anor*. [1982] CLJ (Rep) 69; [1982] 1 MLJ 258. In *Hari Singh's* case, *supra*., the High Court held that fresh evidence could not be introduced at the hearing of a motion to set aside an *ex parte* order made in chambers. Similarly, in *Datuk Abu Mansor's* case, *supra*., the Federal Court held that fresh evidence could not be introduced at the hearing of an application to set aside the *ex parte* order made in chambers, as such evidence was not before the Judge and he could not have exercised his discretion in matters unknown to him. In both these cases, the Courts based their decision on the authority of an English case, *Munn v. Longden* [1883-84] 32 WR 675. In that case**,** Kay J at pp. 675 and 676, said:

> The question is here raised whether the Judge is, after a case is heard in chambers, able to receive further evidence on a motion to discharge the order ... After a Judge has given his reasons, and shown the weak points of a case, if it were the practice to allow further evidence to be put in, that would be most dangerous practice... If there were such a practice of reviewing the decision by a Judge. **When the Court is called on to admit further evidence it must be satisfied that the evidence in question could not have been given before.** [Emphasis Added].

In both *Hari Singh's* case, *supra*., and *Datuk Abu Mansor's* case, *supra*., the fresh evidence which was intended to be introduced during the *inter parte* proceedings was available at the time of the *ex parte* applications.

But in the present case, the evidence exhibited to the affidavit in question was not available at the time when the plaintiffs made the *ex parte* applications. According to Mr. Thomas, the Registry of Companies was closed from 15 December 1984, because it was moving premises. The Registry had just become partially open to the public from 22 January 1985. Therefore, it was not possible for the plaintiffs to conduct any searches in the Registry and to present such evidence at the time of the *ex parte* applications. Mr. Krishnan confirmed that the Registry was closed during the period in question. The affidavit of Chan Kah Hong dated 29 January 1985 referred to a column appearing in 22 January 1985 issue of the Star news paper which confirmed that the Registry was closed since 15 December 1984 and was partially open towards the end of January. I am fully satisfied that the evidence of the searches could not have been presented at the time of the *ex parte* applications. In view of this fact, *Hari Singh's* case and *Datuk Abu Mansor's* case do not apply to the present case. I accordingly ruled that the affidavit dated 29 January 1985, together with the evidence of searches made at the Registry of Companies, are admissible. Further affidavits filed by the plaintiffs exhibiting similar evidence in respect of other companies affected by the Mareva injunctions were also admitted.

Even if the evidence was available at the time of the *ex parte* applications for Mareva injunctions or an Anton Piller Order but the evidence was not presented to the Judge then, in my opinion the plaintiff is not estopped from introducing such evidence during the *inter partes* proceeding. *Hari Singh's* case and *Datuk Abu Mansor's* case dealt with applications under the Debtors Ordinance. Applications under this Ordinance have to comply with strict statutory requirements whereas Mareva injunction rests with the Court's general discretion

and is not circumscribed by statutory requirements. The points requiring proof for a Mareva injunction are therefore less demanding than those required for an order under the Debtors Ordinance. *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] CLJ (Rep) 319. There are indeed decided cases where further evidence has been introduced in *inter parte* injunction proceedings or in Mareva cases. In *Lian Keow Sdn. Bhd. & Anor. v. Overseas Credit Finance (M) Bhd. & Ors.* [1982] CLJ (Rep) 182, the appellants obtained, upon an *ex parte* application, from Annuar J, an interlocutory injunction against the first and second and third respondents. The second respondent filed an application to set aside the injunction and the application was heard by Yusoff J. The learned Judge allowed the application and set aside Annuar J's order. The appellant appealed against the order of Yusoff J In its judgment the Federal Court said:

> Whatever complaint could be made regarding lack of opposing affidavits and arguments in this case, surely when the matter came before Yusoff J all these affidavits and arguments were before him. He should therefore decide the matter on the basis of those affidavits and arguments which were before him, and not to decide it on the basis of materials available before Annuar J.

In *Third Chandris Shipping Corporation & Ors v. Unimarine SA* [1979] 2 All ER 972, the English Court of Appeal allowed further evidence to be adduced before it in deciding a Mareva case. Similarly in *Hadmor Productions Ltd. & Ors. V. Hamilton & Anor.* [1982] 2 WLR 322, the House of Lords recognized that further evidence may be adduced in considering whether interlocutory injunctions should be granted or not.

I shall now turn to the substance of the matter in the Interveners' applications, viz. whether the Mareva injunctions and the Anton Piller Order, as varied, comply with the essential requirements of the law based on the evidence available before the Court.

I shall first deal with the essential requirements in respect of the Mareva injunction. In *Ace King Pte.Ltd. v. Circus Americano Ltd. & 2 Ors.* [1983] CLJ (Rep) 444 at 449, I stated that there are two requirements to be satisfied with for a Mareva injunction to be granted. But for the purpose of the present judgment, I propose to split them into three ingredients, namely:

(i) the plaintiffs must show that they have a good arguable case;

(ii) the plaintiffs must produce evidence that the defendant has assets within jurisdiction; and

(iii) that there is a risk of the assets being removed before the judgment is satisfied.

I shall deal with the first ingredient, viz., whether the plaintiffs have a good arguable case against Lorrain.

According to the statement of claim, Lorrain was the first director of the BMF. Between 1 January 1972 and 31 October 1983 he was chairman of the board of directors of the BMF. He held the position as director and chairman as a nominee of the Bank, and he was therefore in a fiduciary relationship with the Bank and BMF and owed fiduciary duties to the Bank and BMF. The case against Lorrain relates to three transactions in which he was directly involved.

The first transaction was in connection with a personal loan obtained by Lorrain from AFIL. By a letter dated 24 October 1980, AFIL forwarded to Lorrain for his execution, relevant documents relating to a loan of RM200,000 to be granted by AFIL to him. This loan was to be secured by a deposit of HK$2.5 million by BMF with AFIL. The documents were duly executed by Lorrain who requested that AFIL remit the RM200,000 to his solicitors in London.

In consideration of AFIL granting him the personal loan, Lorrain, on or about 30 April 1981, caused the deposit by BMF of HK$2.5 million with AFIL as security for the said loan. On or about 18 May 1981, Lorrain, without the authority of BMF, caused the payment by BMF of monies belonging to BMF in the sum of HK$182,859.59 to AFIL being payment of interest due on Larrain's personal Loan. On 2 February 1982, a cheque in the sum of HK$2,625,239.73 was given to AFIL in full settlement of Lorrain's personal loan. On 3 February 1982 AFIL returned the deposit of HK$2.5 million to BMF.

The plaintiffs contended that Lorrain had embarked on a deliberate cause of conduct, which had put his personal interests as a beneficiary of the personal loan and this was in direct conflict with his pre-existing and continuing duty as a director of the Bank and chairman of BMF. Lorrain was, accordingly, in breach of his fiduciary duty to the Bank and BMF (i) in failing to fully disclose to the Bank and BMF all the relevant information pertaining to his personal loan transaction, (ii) in failing to obtain the approval of the Bank and BMF prior to his securing the said personal loan, and (iii) in receiving the same for his personal purposes and profit.

The second transaction was a transaction involving RM12,500,000, HK$178.5 million and UK£4 million in questionable circumstances. From 12 July 1980 to 13 December 1980, Messrs. Selvarajah & Associates, a firm of advocates and solicitors practising in Kuala Lumpur received, on behalf of Lorrain, a sum of RM12.5 million from Plessey Investment Ltd. and Carrian Investments Ltd. Tan Sri Selvarajah confirmed on 8 October 1980, that his firm received the said sum on behalf of Aspatra Sdn. Bhd. After the said sum was received by Messrs. Selvarajah & Associates, Lorrain approved or otherwise caused the granting of further loans and credit facilities to the Carrian Group of Companies in the region of HK$3.2 billion.

The third transaction involved a sum of RM15,152,853.60. On 19 March 1981, BMF, through Lorrain instructed the Bank to debit BMF's account in the sum of RM3,442,340.79 and to credit the same for the account of M/s. Ng Ek Teong and Partners, a firm of advocates and solicitors, practising in Kuala Lumpur which was acting on behalf of Lorrain. On 23 March 1981, Lorrain approved credit facilities to be extended by BMF in the sum of US$10 million to the Carrian Group. On 25 March 1981, George Tan sent a cash order for the sum of RM9,470,512.27 made payable to Lorrain's solicitors, M/s. Ng Ek Teong & Partners. On 20 November 1981, another sum of RM2,240,000 was remitted by a member of the Carrian Group to the same firm of solicitors for Lorrain.

For the second and third transactions, Lorrain received a total sum of RM27,652,853.06. The plaintiffs averred that the defendant received this sum of money wrongfully and without the knowledge and approval of the Bank and BMF, and in breach of his fiduciary duty as director of the Bank and chairman of the BMF.

In my opinion the plaintiffs have shown that they have a good arguable case. Indeed, the plaintiffs have a strong *prima facie* case against Lorrain. As stated above, Lorrain was acting in breach of his fiduciary duty as director of the bank and as chairman of the BMF. In *Regal Hastings Ltd. v. Gulliver & Ors.* [1942] 1 All ER 378, the House of Lords held that directors were in a fiduciary relationship to the appellant company and liable to repay to it the profit they had made on the sale of the shares. In this case the appellant was the company, Regal. The appellant brought an action against the first five respondents, who were directors of Regal, to recover from them sums of money amounting to £1010 8s. 4d., being profits made by them upon the acquisition and sale by them of shares in the subsidiary company formed by Regal. In his judgment, Viscount Sankey said:

> ... In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fide*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or have a personal interest conflicting with the interests of those whom he is bound to protect ...

Secondly, Lorrain was only able to receive the said sum of RM27,652,853.06 by nature of his positions as director of the bank and chairman of the BMF and accordingly as agent of the Bank and BMF. In the circumstances, the plaintiffs are entitled to claim from him the said sum under s. 169 of the Contracts Act, 1950. The section clearly states:

> ... If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of an account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transactions.

Thirdly, Lorrain did not act honestly and he did not use reasonable diligence in the discharge of the duties of his office as director of the Bank and accordingly he is liable to the Bank under s. 132 (3) of the Companies Act, 1965, for all profits made by him as a result of his actions. Section 132 (3) states:

> (3) An officer or agent who commits breach of any of the provisions of this section shall be-
>
> (a) liable to the company for any damage suffered by the company as a result of the breach of any of those provisions; and
>
> (b) guilty of an offence against this Act.
>
> Penalty: Imprisonment for one year or two thousand five hundred dollars.

Fourthly, Lorrain was in breach of his duties as Chairman of the board of directors of the BMF and is, therefore, liable to BMF in common law for all damages suffered by BMF as a result of the breach.

The next ingredient to consider is whether Lorrain has assets within jurisdiction. In the present application, the Court is only concerned with Lorrain's assets in the companies which are interveners and in other companies referred to earlier. The plaintiffs produced evidence that Lorrain has a substantial amount of assets in those companies. Mr. Thomas urged the Court to lift the corporate veil of those companies. He submitted that once the corporate veil is lifted the Court has the inherent jurisdiction to extend the Mareva injunction to those companies. According to him, Lorrain is the alter ego of the companies.

Mr. Anand Krishnan, on the other hand, submitted that a Mareva injunction is only granted against a defendant and not against a third party such as the interveners. On the question of lifting the corporate veil, he argued that in the present case there is no justification for the Court to lift the corporate veil. He cited the case of *Salomon v. Salomon & Co*. [1897] AC 22 in support of his argument.

It is now necessary to examine whether the Court can lift the corporate veil of the companies in question, including the interveners. In *Salomon v. Salomon, supra.*, the House of Lords laid down the principle that a company is a separate entity from its shareholders. But this principle does not prevent the Court from lifting the corporate veil. In *Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners*, [1969] 1 WLR 1241 Lord Denning MR, said at p. 1254:

> The doctrine laid down in *Salomon v. Salomon & Co* ... has to be watched carefully. It has often been supposed to cast a veil over the personality of a limited company through which the Courts cannot see. But that is not true. The Courts can and often do draw aside the veil. They can, and often do, pull the mask. They look to see what really lies behind...

The Courts in England have lifted the corporate veil where there is a case involving fraud. See *Re Darby* [1911] 1 KB 95. The veil was also lifted in the case involving enemy property in time of war. See *Re St. Tudno* [1916] P 291. Similarly, the veil was lifted in a case involving a restraint of trade. See *Gilford Motor Company v. Horne* [1933] 1 Ch 935. Apart from these cases, the Courts have also lifted the corporate veil in several other instances.

In *Lennards's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.* [1915] AC 705, a ship and her cargo were lost due to unseaworthiness. The owners of the ship were a limited company. This company was managed by another limited company whose managing director, one Mr. Lennard, managed the ship on behalf of the owners. He knew of the ship's unseaworthiness but took no steps to prevent the ship from pulling to sea. The owners of the ship claimed that they were not liable for Mr. Lennard's fault. Viscount Haldane LC, in his judgment at p. 718 said:

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the share-holders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association and is appointed by the general meeting of the company, and can only be removed by the general meting of the company. My Lords, whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502.

In *Jones & Anor. v. Lipman & Anor.* [1962] 1 All ER 442, first defendant agreed to sell freehold land with registered title to the plaintiffs for £5,250. Pending completion he sold and transferred the land to the defendant company of which he and a clerk for his solicitors were shareholders and directors for £3,000, of which £1,564 was borrowed by the defendant company from a bank and the rest remained owing to the first defendant. The Court held that the defendant company was a cloak for the first defendant, who could compel a transfer of the land to the plaintiffs, and they could decree specific performance against both defendants. Russel J in his judgement said:

> The defendant company is the creature of the defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity ... an equitable remedy is rightly to be granted directly against the creature in such circumstances.

In *Merchandise Transport Ltd. v. British Transport Commission & Ors.* [1962] 2 QB 173, the applicant company was a subsidiary of a company of furniture manufacturers. The subsidiary company which had "A" licences carried on the business of road haulage and had been carrying on the loads of the parent company. The applicants applied for a variation of their "A" licence so as to permit them to use additional vehicles which were subject to "C" licence held by the parent company. The licensing authority dismissed the application. The Court refused to recognize the applicants and the parent company as two independent bodies but treated them as one commercial unit.

In *D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council* [1976] 1 WLR 825, the Court of Appeal held that where the question at issue was the entitlement of the owner of a business to be compensated for its extinguishment and on the facts the trading company was in a position to control the subsidiary companies in every respect, the Court could pierce the corporate veil which regarded limited companies as separate legal entities and treat the group as a single economic entity for the purpose of awarding compensation for disturbance.

The authorities cited above do not define any clear principle or definite policy. According to Professor Gower in his book, *Modern Company Law*, 4th Edn., at p. 138:

> ...The most that can be said is that the Court's policy is to lift the veil if they think that justice demands it and they are not constrained by contrary binding authority.

Professor Gower's view appears to be consistent with the decision of the Court in this country. In *Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor*. [1980] 1 MLJ 109, Salleh Abas FJ, as he then was, said in his judgment at p. 112:

> It is true that while the principle that a company is an entity separate from it shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the Court has, in a number of cases, by-passed this principle if not made an inroad into it. **The Court seems quite willing to lift" the veil of incorporation' (so the expression goes) when the justice of the case so demands.** Thus the facts of the case may well justify the Court to hold that despite separate existence a subsidiary company is an agent of the parent company or vice versa as was decided in *Smith, Stone and Knight v. Birmingham Corporation (1); Re F.G. (Films) Limited (2); and Firestone Tyre & Rubber Co. v. Llewelyn.* (3) [Emphasis added]

The learned Judge went on to state in his judgment:

> It is clear therefore that the approach taken by the President of Industrial Court is not without any legal support when he placed an emphasis on the essential unity of group enterprise which in this case consists of the Hotel and the Restaurant, especially when Datuk N.A. Kularajah who is the Managing Director of the Hotel was also the Managing Director and later a Director of the Restaurant and had the ultimate authority over the employees. Thus, the practice of treating the employees of the Restaurant as being separate from the employees of the Hotel such as the Union having been told that they were so, their salaries, their EPF and SOCSO contributions being paid by the Restaurant, does not detract from the fact that the employees in question were in fact working in one group enterprise. In my judgment, by giving recognition to this fact, the President did not cause any violence to the sanctity of the principle of separate entity established in *Salomon v. Salomon & Co*. but rather gave effect to the reality of the Hotel and the Restaurant as being in one enterprise. I find nothing unreasonable in the finding of the President by by-passing this principle. He did no more than to comply with the wishes of the Legislature that in the making of an award substantial merits of the case, the public interest and any matters which are necessary or expedient for the purpose of settling the dispute are among the factors which should be taken into consideration by the Court.

The decision in *Hotel Jaya Puri's* case was followed in *Tiu Shi Kian & Anor. v. Red Rose Restaurant Sdn. Bhd.* [1984] 2 CLJ 543. But on appeal, the Federal Court felt that it was not necessary to lift the corporate veil. Salleh Abas LP, however, in his judgment said:

> They should not be allowed to escape responsibility for what they have done by darting in and out within the corporate labyrinth of these two companies at their convenience.

See *Datuk Hong Kim Sui v. Tiu Shi Kian & Anor*. [1985] CLJ (Rep) 101 at 105.

In the present case, the Court, in considering whether to lift the corporate veil, has to bear in mind whether "the justice of the case so demands."

I shall now examine the companies affected by the Mareva injunctions.

Aspatra Sdn. Bhd: As at 15 November 1982, Lorrain is the registered holder of 1,999,999 shares out of 2,000,000 shares. All the shares are owned by Lorrain except one, which is owned by Haji Abdul Rahman. Lorrain is a director of this company.

The Lodge Sdn. Bhd: As at 15 August 1981 this company is a wholly owned subsidiary of Aspatra Sdn. Bhd. which holds the entire paid up capital of 450,000 shares. Thus all the shares are controlled by Lorrain through Aspatra Sdn. Bhd.

Orient Air Transport Sdn. Bhd: As at 6 February 1984 Lorrain is the registered holder of 170,003 out of 170,004 shares. The other one share is owned by one Norma M. Noor. Lorrain is a director of this company.

Aspatra Motors Sdn. Bhd: As at 1 November 1982 Lorrain is the registered holder of 200,000 shares and Aspatra Sdn. Bhd., which is controlled by Lorrain, is the registered holder of 1,100,000 shares out of 1,300,001. One share is owned by Norma bt. M. Noor. Lorrain is a director of this company.

Aspatra Group Holdings Sdn. Bhd: As at 31 December 1983, Lorrain is the registered holder of 2,999,999 shares out of 3,000,000 shares. The other one share is held by one Admi bin Othman. Lorrain is a director of this company.

Aspatra Group Holdings Sdn. Bhd: As at 31 December 1983 Lorrain is the registered holder of 5,000,001 out of 5,000,003 shares. The two shares are each held by Norma bt. M. Noor and Sharifah bt. Wah. Here again, Lorrain is a director.

It is clear that, with the exception of the Lodge Sdn. Bhd., all the five other companies are fully controlled by Lorrain. The presence of one or two persons who hold one share each is merely for the purpose of complying with the requirements of the Companies Act. Section 36 of the Act prohibits a company from carrying on business for more than six months if the number of members in that company is less than two. So all the five companies, for practical purposes, are fully owned by Lorrain. He owns not only all the shares but one in each Company, but also all the assets of the company. He is the director of these five companies and an inference can be drawn that he controls them. In the case of the Lodge Sdn. Bhd., it is wholly owned subsidiary of Aspatra Sdn. Bhd. Since Aspatra Sdn. Bhd., is fully owned and controlled by Lorrain, Lodge Sdn. Bhd., too, is owned and controlled by him. Lorrain is the alter ego of these six companies. The assets of these companies are the assets of Lorrain. In the circumstances, it is justified for the Court to lift the corporate veil of these companies.

In addition to these six companies there are 66 other companies which are fully owned and controlled by Lorrain. In respect of these other companies the Court is also justified in lifting the veil based on the evidence of searches made in the new office of the Registry of Companies between 21 January 1985 and 13 February 1985. This evidence is contained in the two affidavits of Miss Elizabeth Iype dated 14 February 1985 and 18 February 1985 and in the affidavits of Mr. Chan Kah Hong dated 29 January 1985 and 7 February 1985, I have examined the evidence in respect of each and every one of the 66 companies and I am satisfied that Lorrain is the alter ego of these companies.

The 69 companies are as follows:- Ahmad bin Jusoh Sdn. Bhd.; Amalgamated Lease Lending & Hiring Sdn. Bhd.; Aspatra Development Sdn. Bhd.; Aspatra Gray Mackenzie Sdn. Bhd.; Aspatra Management Sdn. Bhd.; Aspatra Quarries Sdn. Bhd.; Aspatra Securities Sdn. Bhd.; Aspatra Trading Sdn. Bhd.; Aspatra Corporation Sdn. Bhd.; Al-Kesil Sdn. Bhd.; Aspatra ICS Sdn. Bhd.; Aspatra Leasing Sdn. Bhd.; Aspatra Nominees Sdn. Bhd.; Aspatra Quest Publishers Sdn. Bhd.; AOE Sdn. Bhd.; Anchor Wate Malaysia Sdn. Bhd.; Aramor Property Sdn. Bhd.; Asiawide Industries Sdn. Bhd.; BB Holdings Sdn. Bhd.; Church Street Properties Sdn. Bhd.; Diako Properties Sdn. Bhd.; Development Consultants Sdn. Bhd.; Eastern Bureau of Communications Sdn. Bhd.; Empire Industries Sdn. Bhd.; Exploration Consultants Sdn. Bhd.; Golden Mile Sdn. Bhd.; Hotel Row Sdn. Bhd.; Hoong Sang Realty Sdn. Bhd.; Indra Bumi (M) Sdn. Bhd.; Indra Bersekutu Sdn. Bhd.; In-Life Trading Sdn. Bhd.; Jack and Jill Sdn. Bhd.; Kemajuan Perkasa Sdn. Bhd.; Kentredder (M) Sdn. Bhd.; Kenprest (M) Sdn. Bhd.; Lorak Holdings Sdn. Bhd.; Lorak Development Sdn Bhd.; Lorak Enterprise Sdn. Bhd.; Lorak Property Sdn. Bhd.; L.M. Lands Sdn. Bhd.; Mutiara Hotel Corp. Sdn. Bhd.; Maju Kulim (M) Holdings Sdn. Bhd.; Maju Kulim (M) Enterprises Sdn. Bhd.; Maju Kulim Development Sdn. Bhd.; Maju Kulim Malaysia Sdn. Bhd.; Mountbatten Investment Sdn. Bhd.; N.H.S. Nominees Sdn. Bhd.; New Hibernia Securities Sdn. Bhd.; Oriewesco Sdn. Bhd.; Oriescan Sdn. Bhd.; Orient Air Travel Sdn. Bhd.; Off shore Operators (M) Sdn. Bhd.; Orchids Malaysia Sdn. Bhd.; Pangkor Hotel Corp. Sdn. Bhd.; Rahid Malaysia Sdn. Bhd.; Sercon Sdn. Bhd.; Serply Sdn. Bhd.; Sg. Ayer Hitam Sdn. Bhd.; Tourists Centre Sdn. Bhd.; Tanjong Securities Sdn. Bhd.; Variel Systems (M) Sdn. Bhd.; Realvest Property Sdn. Bhd.; LM Development Sdn. Bhd.; Wei Tong Realty Sdn. Bhd.; Engineering and Marine Services (M) Sdn. Bhd.; Muda Development Corp. Sdn. Bhd.; and Otomotif Malaysia Sdn. Bhd.; Harboard Holdings Sdn.; and Reptiles Malaysia Sdn. Bhd.

The question that arises here is whether it is proper to extend the Mareva injunctions granted earlier to these 75 companies. Mr. Thomas informed the Court that to date there are no reported cases directly on this question. The closest authority he could find is the dictum of Donaldson J. as he then was, in *Iraqi Ministry of Defence & Ors. v. Arcepey Shipping Co. SA* [1980] 1 All ER 480 where at p. 493, it is stated:-

> ... The Mareva jurisdiction is still in a formative stage. Its original purpose is clear. It was to prevent foreign defendants making themselves judgment-proof by removing their assets from the jurisdiction or by disposing of those assets within the jurisdiction to shareholders or others who might be amicably disposed and doing so before judgment and execution.

This passage is not very helpful.

In order to find the answer to the question I think it is appropriate here to examine briefly the development of the Mareva procedure since the decisions of the Court of Appeal in England in *Nippon Yusen Kaisha v. Karageorgis & Anor.* [1975] 3 All ER 282 and *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509. The Mareva procedure has developed step by step. In the *Nippon's case supra.*, and the *Mareva's* case *supra*., the injunction was issued against monies belonging to foreign defendants. In *Rasu Maritima SA v. Perusahaan Pertambangan Minyak dan Gas Negara (Pertamina)* [1977] 3 All ER 324, the cash assets were extended to other assets namely goods within jurisdiction. In *Chartered Bank v. Dak Louche & Anor.* [1980] 1 All ER 205, the procedure was no longer directed against foreign defendants only but was extended to apply to a defendant residing within jurisdiction. See also *Prince Abdul Rahman v. Abu Jaba & Anor*. [1980] 3 All ER 409. The procedure was further extended to apply in a case of a personal injury claim. See *Allen v. Jambo Holdings Ltd. & Ors.* [1980] 2 All ER 502.

If the Court is to extend the Mareva procedure to a new situation as in the present case, the Court has to comply with the principle governing the Mareva procedure. In *Z Ltd. v. A-Z* [1982] 1 QB 558, the English Court of Appeal held that the Mareva injunction should be granted where it appeared likely that the plaintiff would recover judgment against the defendant for a certain or approximate sum and there were reasons to believe that the defendant had assets within the jurisdiction to meet the judgment, wholly or in part, but might deal with them so that they were not available or traceable when judgment was given against him. In *Zainal Abidin v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260 the Federal Court said:

> It is an injunction granted *ex parte* against a defendant in a pending action to restrain him from removing assets from and now even dissipating them within the jurisdiction and so stultifying any judgment in favour of the plaintiff.

In the instant case the Mareva injunctions are restraining the 75 companies from removing their assets or dissipating them. It is true in *Z Ltd. v. A-Z supra*., and in *Zainal Abidin's case supra*., the Courts were referring to the assets of the defendants. But in the present case, after the corporate veil has been lifted, it is found that the assets of these 75 companies are the assets of Lorrain. In my judgment, the Mareva injunctions granted on 15 January 1985 apply to the assets of these 75 companies. The injunctions, therefore apply to the shares of Lorrain in these 75 companies. The injunctions also apply to all the monies kept in the respective bank accounts of these 75 companies subject to the variation orders previously referred to.

Apart from the 75 companies, there are six other companies listed in the order dated 15 January 1985, where Lorrain owns only a certain percentage of the shares. The evidence is contained in the affidavits of Miss Elizabeth Iype dated 14 February 1985 and 18 February 1985 and in the affidavit of Mr. Chan Kah Hong dated 29 January 1985. In Shakey's Pizza Sdn. Bhd., he owns 15% of the shares. In Aspatra Guan Hoe Sdn. Bhd. he owns approximately 15% of the total shares. In Malaysia Tours and Safari Sdn. Bhd. Lorrain owns 80% of the shares. In another company, Syarikat Kewangan Malaya Raya Sdn. Bhd., he owns 200 shares out of 42,600 shares. Another company where he owns a certain percentage of the shares, i.e. 1,300 shares out of 5,000 shares is Darul Aman Holdings. In National Timber Co. Sdn. Bhd., Lorrain owns about 50% of the shares.

It is clear that, Lorrain does not own fully all these five companies and neither is he in full control of them. In the circumstances, it is not proper for the Court to lift the corporate veil of these companies. The Mareva injunctions can, however, be enforced in respect of these companies in so far as Lorrain's shares are concerned. The Court has the jurisdiction to extend the Mareva injunctions to these companies as third parties. The situation here is similar to that of a bank where a defendant has kept his money assets. It is an accepted practice that a Mareva injunction extends to the assets of a defendant kept in a bank. In *Z v. A-Z supra*., Lord Denning MR, in his judgment at p. 573 said:

> ... once a bank is given notice of a Mareva injunction affecting goods or money in its hands, it must not dispose of them itself, nor allow the defendant or anyone else to do so - except by the authority of the Court. If the bank or any of its officers should knowingly assist in the disposal of them, it will be guilty of a contempt of Court...

I accordingly order that the Mareva injunction granted on 15 January 1985, applies only to Lorrain's shares in these five companies.

With regard to the remaining eleven companies, the Court finds that from the evidence contained in the various affidavits filed by the plaintiffs, Lorrain has no interest whatsoever in each of these companies. These companies are Aspatra Industries Sdn. Bhd.; Aspatra Warehousing Sdn. Bhd.; Scorpion Orchid Properties Sdn. Bhd.; Landhill Property Sdn. Bhd.; Nila Sdn. Bhd.; Saji Sdn. Bhd.; Syarikat Kim Sun MFG (M) Sdn. Bhd.; Anggerik Merpati Sdn. Bhd.; Aspatra Warehouse Sdn. Bhd.; Broadvis Productions Sdn. Bhd.; and Crossway Property Sdn Bhd. Three of the companies, Saji Sdn. Bhd.; Nila Sdn. Bhd. and Syarikat Kim Sun MFG (M) Sdn. Bhd. are interveners/applicants in this proceeding. I accordingly allow their applications with costs and order that the Mareva injunctions granted against them in so far as they touch and concern or apply to or affect them be dissolved. As to the other remaining companies, I order that the Mareva injunctions, in so far as they concern or apply to or affect them, be dissolved forthwith.

Before I go on to the next ingredient, it is pertinent to consider here whether it is proper for a Mareva injunction to include an order for discovery as in the present case. In *A & Anor. v. C & Ors.* [1980] 2 All ER 347, the Court held that it had the power to make an order for discovery of documents or for interrogatories in aid of a Mareva injunction where it was necessary to do so for the proper and effective exercise of the Mareva jurisdiction. The Court also held that it had the power to order a third party to give discovery of documents. In *CBS United Kingdom Ltd. v. Lambert & Anor.* [1982] 3 All ER 237 Lawton LJ said at p. 242:

> A jurisdiction to grant Mareva injunctions, however, is not likely to be of any use to a plaintiff who believes that he is suing a defendant who intends to deal with his assets in such a way as to deprive him of the fruits of any judgment he may obtain unless there is some means of making the defendant disclose what his assets are and whereabouts they are to be found..

See also *Z v. A-Z, supra.*, at p. 577. It is clear from the authorities that this Court has the power to include an order for discovery in a Mareva injunction. The order of discovery may be directed against the defendant or a third party.

I shall now turn to the third ingredient **viz.,** whether there is a risk of the assets being removed before the judgment is satisfied. The question that arises here is what is the test to be applied by the Court in determining whether there is such a risk. In *Third Chandris Shipping's case, supra.*, Lawton LJ, in his judgment at pp. 671, 672, said:

> There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from jurisdiction...Judges (of the Commercial Court) have special experience of commercial cases and they can be expected to identify likely debt dodgers as well as, probably better than, most businessmen. They should not expect to be given proof of previous defaults or specific incidents of commercial malpractice. Further they should remember that affidavits asserting belief in, or the term of likely default have no probative value unless the sources and grounds thereof are set out...In my judgment an affidavit in support of a Mareva injunction should give enough particulars of the plaintiff's case to enable the Court to assess its strength and should set out what inquiries have been made about the defendant's business and what information has been revealed, including that relating to its size, origins, business, domicile, the location of its known assets and the circumstances in which the dispute has arisen. These facts should enable a Commercial Judge to infer whether there is likely to be any real risk of default..

In the *Pacific Centre's* case, *supra*., Edgar Joseph Jr. J, after reviewing the relevant passages in the English cases, came to the conclusion, at p. 150, that the test is as follows:

> I prefer the view that it would be sufficient for the plaintiff to merely show a risk of disposal of assets which has the **effect** of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant..

I entirely agree with this test.

I shall now examine the evidence whether there is a risk of the disposal of Lorrains's assets in the present case.

Lorrain is a man who does not keep all his assets in Malaysia. The RM200,000 loan he obtained from AFII in 1980 was remitted to his solicitors in London. From his conduct it can be inferred that he can transfer his assets from this country to another country.

There is evidence that Lorrain was planning to sell or dispose off his shares and securities through a firm of stock-brokers in Kuala Lumpur. In his affidavit dated 15 January 1985, Encik Johari Bin Zakaria, the manager of the Legal Department of the Bank, said:

> The Bank & BMF have reason to believe that Lorrain, directly or indirectly, is endeavouring to sell or otherwise dispose off shares and securities belonging to him through a firm of stock-brokers in Kuala Lumpur, viz. M/s Rashid Hussain Securities Sdn. Bhd. and unless he is restrained from so doing any judgment that may eventually be obtained against him in this action would not be enforced satisfactorily.

In fact the plaintiff's solicitors had great difficulty in trying to locate him to serve the cause papers. They went to his home addresses as well as the addresses of his companies. Yet nobody seemed to know of his whereabouts. See the affidavit of Lee Kim Cheng dated 15 January 1985 and the affidavit of Kok Chee Kheong dated 17 January 1985. From his conduct it is clear that Lorrain is not interested in defending the case against him or in applying to set aside the Mareva injunction granted against him.

There is evidence that Lorrain has informed the Bank that monies owing to him by way of director's fees should be credited by the Bank to the account of Malaysia Plastic Sdn. Bhd. This was stated by Encik Johari Bin Zakaria in his earlier affidavit dated 10 January 1985.

In the same affidavit Encik Johari referred to the meeting on 16 July 1984 between Lorrain and the Committee of Inquiry appointed by the Bank to investigate into the BMF affair. At this meeting Lorrain agreed to cooperate with the Committee if he was sent written questionnaire which he would answer in writing. On 20 July 1984, the Committee forwarded to him a written questionnaire. Lorrain, however, failed to respond to the questionnaire even though the Committee sent him three reminders. From his conduct, it can be concluded that, to borrow the words of Mustill J. in *Ninemia Maritime Corp. v. Trave* [1984] 1 All ER 398 at p. 403, "his (Lorrain's) probity is not to be relied on ..."

The BMF affair has been given wide publicity by the mass media and Lorrain's name has been closely linked with the affair. (See the affidavit of Johari bin Zakaria dated 10 January 1985). The writ against Lorrain was filed on 10 January 1985. On the same day a Mareva injunction was ordered against him. Yet up to the last date of the hearing of the applications of the interveners i.e., 18 February 1985, he had not entered any appearance, conditional or otherwise.

In my opinion, there is sufficient evidence before the Court to conclude that there is a risk that Lorrain's assets would be disposed off thus frustrating or nullifying any judgment that the plaintiffs may obtain against him. In my judgment the orders of the Court granting the Mareva injunctions against Lorrain and the 81 companies were properly granted and there is

adequate evidence before the Court to justify making the orders. I should mention here that the Mareva injunctions should be confined to Lorrain's assets not exceeding RM27,652,853.06, which is the amount claimed in the writ.

I shall next deal with the Anton Piller order. It will be noted that the order is granted against the defendant and a company controlled and directed by him viz. Aspatra Sdn. Bhd.

The law relating to this type of order was laid down in the case of *Anton Piller KG v. Manufacturing Processes Ltd. & Ors.* [1976] 1 Ch 55. In that case the English Court of Appeal held that where plaintiffs had a very strong *prima facie* case, actual or potential damage to them was very serious and there was clear evidence that the defendants possessed vital material which they might destroy or dispose of so as to defeat the ends of justice before any application *inter partes* could be made, the Court had inherent jurisdiction to order defendants to permit plaintiffs' representatives to enter defendants' premises and to inspect and remove such material. In *Yousif v. Salama* [1980] 3 All ER 405 Lord Denning MR in his judgment at p. 406, said as follows:

> The plaintiff then became very anxious about the file and the desk diary he had seen which contained details of the transactions. He became fearful that the defendant would destroy those documents before the actual hearing of the case ... But in this case there is evidence ... which shows the defendant to be untrustworthy. The plaintiff has a legitimate fear that the documents will be destroyed. In the circumstances, it seems to me that it would be proper to make an Anton Piller order ...

These two English decisions were followed in this country in *Lian Keow Sdn. bhd. v. C. Paramjothy & Anor.* [1982] CLJ (Rep) 522 and the Court here now has the jurisdiction to grant an Anton Piller order.

In the present case, the Court has found that the plaintiffs have a strong *prima facie* case against Lorrain. In his affidavit dated 15 January 1985, Encik Johari bin Zakaria averred that despite attempts made to serve on Lorrain the cause papers and the order of the Court, the plaintiffs were not able to do so as Lorrain was not in his residence or at his office. As stated earlier, nobody seems to know the whereabouts of Lorrain. He showed no interest in defending the action against him. No appearance was entered by him. In para. 9 of his affidavit, Encik Johari stated:

> I believe that Lorrain and/or Aspatra Sdn. Bhd. have in their possession, custody or control documents and files which will throw light on the value, nature & whereabouts of Lorrains' assets and since the Order of the Court could not be served personally on him ... the Bank and BMF are left with no alternative but to apply for the 'Anton Piller' order ...

In para. 10, he said:

> ... the bank and BMF should have inspection in this manner so that justice can be done between the parties. I believe that the normal process of the law would be rendered nugatory if some immediate & effective measures are not available to the Bank and BMF.

I have already made a finding earlier that there is a risk that Lorrain's assets would be dissipated if the Mareva injunctions were not granted. For the same reason, I have stated earlier, there is also a risk that all the relevant documents relating to his assets would be destroyed. In *Yousif v. Salama, supra.*, Lord Denning MR. held that as the defendant was shown to be untrustworthy the 'plaintiff had a legitimate fear that the documents will be destroyed ..." Similarly, in the present case, in view of Lorrain's conduct, his probity cannot be relied on. The plaintiffs have, therefore, a legitimate fear that the documents would be destroyed.

In the authorities cited above, an Anton Piller order was granted against the defendant. But in the present case the order was made not only against Lorrain, who is a defendant in the present action, but also against "a company controlled and directed by him viz. Aspatra Sdn. Bhd." Earlier in my judgment, I have lifted the corporate veil of this company and found that it is fully owned and controlled by Lorrain. The assets of Aspatra Sdn. Bhd. are the assets of Lorrain and all documents pertaining to those assets kept by the company are the documents of Lorrain.

In the circumstances the Anton Piller Order granted on 15 January 1985 is justified in law.

One final question remains to be considered **viz.,** whether the Mareva injunctions should continue in force against the 81 companies until the trial of the action, and whether the Anton Piller Order should continue to apply against Aspatra Sdn. Bhd. In order to decide on this question the Court has to consider the balance of convenience. *American Cynamid Co. v. Ethicon Ltd.* [1975] AC 396.

The plaintiffs are claiming a sum of RM27,652,853.06 against Lorrain. Lorrain has not shown any interest in defending the claim. The Mareva injunction and the Anton Piller Order have not been served on him and the plaintiffs have to rely on the assets of his 81 companies to recover the fruits of their judgment should they succeed in their claim. The Mareva injunction does not cause any hardship against these companies. Several variation orders were made to enable them to carry on and conduct all their activities in the ordinary course of their business and they are at liberty to operate their various accounts with all their bankers in Malaysia (including paying in and paying out). Similarly, the Anton Piller order does not cause any hardship to Aspatra Sdn. Bhd. All the plaintiffs need to do is to inspect all documents and files relating to Lorrain's assets and to remove those documents to the office of the plaintiff's solicitors. As Lord Denning said in *Yousif v. Salama, supra.*, at p. 406:

> ... the documents which are received in pursuance of the Anton Piller order are kept in the Solicitor's personal custody, it seems to me that the granting of the order can in no way harm the defendants.

In my judgment, I find that the balance of convenience should be decided in favour of the plaintiffs.

For the reasons stated above, I make the following orders:

PART A (28 Interveners/Applicants).

(1) In respect of Aspatra Sdn. Bhd.

(a) I dismiss their prayers for dissolution of the injunctions dated 10 and 15 January 1985;

(b) In respect of the prayer for the variation of the said injunctions I allow as per the consent order reached between the parties;

(c) In respect of the prayer for dissolution of the Anton Piller Order granted on 15 January 1985 and as varied by the order on 17 January 1985, I dismiss the application;

(d) The questions of damages and costs to be reserved for arguments to a later date.

(2) In respect of Saji Sdn. Bhd., Nila Sdn. Bhd; and Syarikat Kin Sun MFG(M) Sdn. Bhd.,

(a) I order that the injunctions dated 10 January 1985 and 15 January 1985 in so far as they touch, concern and affect them, be and are hereby dissolved with costs; and

(b) the question of damages be reserved for argument to a later date.

(3) In respect of Aspatra Guan Hoe Sdn. Bhd. and Shakey's Pizza Sdn. Bhd.,

(a) Their prayers for dissolution of the injunctions dated 10 and 15 January 1985 are hereby dismissed;

(b) In respect of prayer 4 for an order that the injunction be varied, I hereby order that these companies are restrained from transferring, selling, dealing with, charging, pledging or otherwise disposing of Lorrain's shares, and

(c) The question of damages and costs be reserved for argument to a later date.

(4) In the case of Suzuki Assemblers (M) Sdn. Bhd., the injunctions dated 10 and 15 January 1985 have already been dissolved by consent on 24 January 1985. The questions of damages and costs are reserved for argument to a later date.

(5) In respect of the other 21 applicants/Interveners,

(a) I dismiss their prayers for the dissolution of the injunctions granted on 10 and 15 January 1985;

(b) In respect of the prayer for variation, I allow the applications as per the consent orders reached between the parties;

(c) The questions in respect of damages and costs are reserved for argument to a later date.

PART B (77 Non-Interveners).

(6) In respect of the following sixty-five (65) companies viz., Ahmad bin Jusoh Sdn. Bhd., Lending & Hiring Sdn. Bhd., Aspatra Holdings Sdn. Bhd., Aspatra Development Sdn. Bhd., Aspatra Gray Mackenzie Sdn. Bhd., Aspatra Trading Sdn. Bhd., Al-Kesil Sdn. Bhd., Aspatra Leasing Sdn. Bhd., Aspatra Nominees Sdn. Bhd., AOE Sdn. Bhd., Anchor Wate Malaysia Sdn. Bhd., Aramor Property Sdn. Bhd., Asiawide Industries Sdn. Bhd., Development Consultants Sdn. Bhd., Eastern Bureau of Communications Sdn. Bhd., Empire Industries Sdn. Bhd., Exploration Consultants Sdn. Bhd., FRD Sdn. Bhd., Georgetown Pharmacy Sdn. Bhd., Development Transport Sdn. Bhd., Harboard Holdings Sdn. Bhd., Hotel Row Sdn. Bhd., Indra Bersekutu Sdn. Bhd., In-Life Trading Sdn. Bhd., Inquip (M) Sdn. Bhd., Jack & Jill Sdn. Bhd., Kemajuan Perkasa Sdn. Bhd., Kentredder (M) Sdn. Bhd., Kenprest (M) Sdn. Bhd., Lorak Holdings Sdn. Bhd., Lorak Development Sdn. Bhd., Lorak Enterprise Sdn. Bhd., Lorak Property Sdn. Bhd., LM Lands Sdn. Bhd., Mutiara Hotel Corp. Sdn. Bhd., Maju Kulim (M) Holdings Sdn. Bhd., Maju Kulim (M) Enterprises Sdn. Bhd., Maju Kulim Development Sdn. Bhd., Maju Kulim Malaysia Sdn. Bhd., Mountbatten Investment Sdn. Bhd., NHS Nominees Sdn. Bhd., New Hibernia Securities Sdn. Bhd., Noble Denton Associate Sdn. Bhd., Oriescan Sdn. Bhd., Orchid Lands Sdn. Bhd., Orient Air Travel Sdn. Bhd., Offshore Operators (M) Sdn. Bhd., Pangkor Hotel Corp Sdn. Bhd., Reptiles Malaysia Sdn. Bhd., Rahid Malaysia Sdn. Bhd., Seltra Warehousing Sdn. Bhd., Sercon Sdn. Bhd., Syarikat Pembangunan Melayu Jaya Sdn. Bhd., Sg. Ayer Hitam Sdn. Bhd., Travel Services Malaysia Sdn. Bhd., Tourists Centre Sdn. Bhd., Tanjong Securities Sdn. Bhd., Telok Batak Granite Quarry Sdn. Bhd., Variel Systems (M) Sdn. Bhd., Cenderai Holdings Sdn. Bhd., Wei Fong Realty Sdn. Bhd., Designs Misin Sdn. Bhd.,Engineering & Marine Services (M) Sdn. Bhd., Muda Development Corp. Sdn. Bhd. and Otomotif Malaysia Sdn. Bhd., I order as follows:

(a) The injunctions granted on 15 January 1985 and varied on 18 February 1985 continue in force,

(b) Liberty to apply.

(7) In respect of the following eight (8) companies **viz.** Aspatra Industries Sdn. Bhd., Aspatra Warehousing Sdn. Bhd., Landhill Properties Sdn. Bhd., Anggerik Merpati Sdn. Bhd., Aspatra Warehouse Sdn. Bhd., Broadvis Sdn. Bhd., Crossway Properties Sdn. Bhd. and Scorpion Orchid Properties Sdn. Bhd., I order as follows:

(a) The injunctions dated 10 January and 15 January 1985 in so far as they touch, concern and affect them, be and are hereby dissolved with costs,

(b) Liberty to apply.

(8) In respect of the following four (4) companies viz. Malaysian Tours and Safari Sdn. Bhd., Syarikat Kewangan Melayu Raya Sdn. Bhd., Darul Aman Holdings Sdn. Bhd. and National Timber Co. Sdn., I order as follows:

(a) The said four companies are restrained from transferring, selling, dealing with, pledging or otherwise disposing of Lorrain's shares,

(b) Liberty to apply.

Also found at [1985] 1 CLJ 552